

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

TITUS HENDERSON,

Plaintiff,

v.

JOHN D. BRUSH, CORRECTIONS
CORPORATION OF AMERICA and
ASSOCIATE WARDEN PICKERING,

Defendants.

ORDER

06-cv-12-bbc

In an order entered in this case on December 8, 2008, I denied defendant John Brush's motion to dismiss for improper service because I concluded that it would not be proper to dismiss plaintiff's claims against defendant Brush because of a mistake made by the marshal in attempting service. Instead, I directed the marshal to make reasonable efforts to locate defendant Brush and respond by January 8, 2009, indicating the efforts the marshal had made in locating this defendant. In the same order, I stayed a decision on defendant Corrections Corporation of America's motion to dismiss for lack of personal jurisdiction or transfer for improper venue pending service of defendants Brush and Pickering. On December 12, 2008, defendant Brush was served with plaintiff's complaint and he has filed

a second motion to dismiss in this case, alleging that plaintiff has failed to state a claim upon which relief may be granted, that this court does not have personal jurisdiction over him and that venue is improper. Also, the court has received an unexecuted service return with regard to defendant Pickering. Because the marshal has made reasonable efforts to locate this defendant and those efforts have been unsuccessful, defendant Pickering must be dismissed from this case.

On the unexecuted return for defendant Pickering the deputy marshal noted his efforts to locate this defendant:

12/16/08 - Attempt by SDUSM McCallister @ 3531 Four Trees Dr. Weatherford Resident stated he did not know Def.

12/18/08 - 1:45 p.m. - Left contact info at 3406 N610th St Mineral Wells.

1/5/09 - Returned unexecuted due to lack of info.

Thus the return shows the marshal attempted to contact Pickering at both the last known address provided by defendant Corrections Corporation of America and another address ascertained through investigation. The return clearly shows that reasonable efforts have been made and those efforts have been unsuccessful. Sellers v. United States, 902 F.2d 598, 602 (7th Cir. 1990) (once defendant is identified, marshal to make reasonable effort to obtain current address). A plaintiff cannot maintain a lawsuit against a defendant who has not received notice of the claim against him and is unable to defend against allegations of wrongdoing. Therefore, the action must be dismissed as to defendant Pickering, without

prejudice to plaintiff's filing a new action against him at some future time if he is able to locate this defendant to serve him with his complaint.

As an additional matter, I note that briefing has not yet been scheduled on defendant Brush's motion to dismiss. Plaintiff may have until January 29, 2009, in which to file a response opposing the motion. Defendant Brush may have until February 9, 2009, in which to serve and file a reply. Once the court has received defendant Brush's reply, both his motion and defendant Corrections Corporation of America's motion to dismiss will be taken under advisement for a decision as soon as the court's calendar permits.

ORDER

IT IS ORDERED that defendant Pickering is DISMISSED from this case because he cannot be served at this time with plaintiff's complaint.

Further, IT IS ORDERED that plaintiff may have until January 29, 2009, in which to file a response opposing defendant Brush's motion to dismiss, dkt. #122. Defendant

Brush may have until February 9, 2009, in which to serve and file a reply.

Entered this 8th day of January, 2009.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge